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IN THE

Supreme Court of the United States

October Term, 1990

ELI MIRZOEFF,

Petitioner,

against

MOTI NAMDAR,

Respondent.

ON PETITION FOR CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

Reply to Brief in Opposition to Certiorari

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Reply to Brief in Opposition to Certiorari

Close scrutiny of the respondent's brief only serves to prove the substantiality of petitioner's case, while putting to rest any claims of procedural infirmities.

I.

Petitioner seeks review of state action taken in violation of due process of law

Whether, and to what extent, arbitration between private litigants partakes of state action has never been decided by this Court. Although a district court answered in the negative in *Austern v. Chicago Board Options Exchange, Inc.* 716 F. Supp. 121, 125 (S.D.N.Y. 1989), aff'd on other grds; 898 F. 2d 882 (2d Cir.), cert. den., ____ U.S ____, 112 L Ed 2d 107 (1990) the Court of Appeals affirmed on other grounds, 898 F. 2d 882 (2d Cir.) and this Court denied certiorari, ____ U.S. ____, 112 L. Ed. 2d 107 (1990), see pet.*, p. 11, f.n. Reliance by respondent on this and other cases to show that the issue is settled, br., p. 6, is patently inappropriate.

F.D.I.C. v. Air Florida System, Inc., 822 F. 2d 833, 842, f.n. 9 (9th Cir. 1987), cert. den. 485 U.S. 987 (1988) involved a ruling by a lower federal court interpreting the definition of an arbitrator's misconduct contained in 9 USC §10(c) as well as Fifth Amendment due process. Moreover, the case at bar raises a question going to the very integrity of the decision-making process. The *Air Florida* case merely involved whether the arbitrators could proceed on written submissions or whether they were bound to conduct a hearing at which oral testimony and argument could be offered.

Elmore v. Chicago Illinois Midland Ry Co., 782 F. 2d 94 (7th Cir. 1986) was decided on the basis that the grievance procedure complained of was not arbitration, *id.* at 96-97. Indeed, the distinguished circuit judge who authored the opinion noted that the National Railroad Adjustment Board

*Page references to the petition and its appendix are indicated by "Pet., p. ____" and "pet., p. ____ a," respectively. Arabic numbers preceded by "br." refer to respondent's brief in opposition to certiorari.

had sufficient governmental connection to be subject to the requirements of Fifth Amendment due process, *id.* at 96.

Respondent's assertion, br., p. 6, that the filing of a lawsuit and the obtaining of relief by a private party does not constitute state action, *Cobb v. Georgia Power Co.*, 757 F. 2d 1251-53 (11th Cir. 1985) begs the question. Agreements to arbitrate are enforced and arbitrators' awards are reduced to judgment or vacated only because Congress or a state legislature has authorized the courts to take such action, 9 U.S.C. §§2-4, 10; NYCPLR 7501-7504, 7511. To suggest, as respondent does, br., p. 7, that such acts are "ministerial" reduces the judiciary to the status of low-grade clerks. Regardless of the latitude given to private parties to govern the arbitration process, government may not lend its power to enforce private arrangements that offend the Constitution, *Shelley v. Kramer*, 334 U.S. 1, 13 (1948).

It strains respondent's credibility for him to suggest, br., p. 8, that judicial toleration of a biased arbitrator does not offend a fundamental principle of our jurisprudence.

Although the arbitration giving rise to this case was conducted by a non-governmental body, contrary to respondent's assertion (br., pp. 1, 7-8), such arbitration was far from "voluntary." Failure of a member of the Diamond Dealer's Club to submit to the Club's arbitration tribunals is grounds for expulsion: tantamount to exclusion from the diamond-trading industry.

II.

The negotiations between the chairman and petitioner were not disclosed to the other arbitrators

Respondent's assertion, br., pp. 7-8, that the ground for disqualification of the chairman of the appeal panel (the

fact of their negotiations during the arbitration process) was "disclosed" and therefore not a basis for vacatur is misleading.

Respondent ignores the fact that the chairman's attempt to coerce the petitioner into parting with merchandise at an unfavorable price by linking the transaction to the outcome of the then pending arbitration *was never made known to the other arbitrators.* See br., pp. 8-9. As we set forth in the petition, p. 11, the harm from this undisclosed transaction results from the mistaken belief by the other arbitrators that they were deliberating with an impartial colleague instead of someone who had an interest in the outcome of the arbitration.

The disqualification of the entire panel because of the misconduct of one of the members was decreed by this Court as a matter of statutory interpretation in *Commonwealth Coatings Corporation v. Continental Casualty Co.,* 395 U.S. 145 (1968). Whether this same rule must be followed as a matter of constitutional due process remains an open question along with the analogous question of whether this rule should also be applied to collegial courts, *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 827-828 (1986), and see pet., p. 11, f.n. **

Respondent cites state cases to the effect that the disqualification of the chairman would have no effect upon the outcome as a matter of state law, br. p. 10. This ignores the primacy of the Constitution of the United States and this Court as its final interpreter. Moreover, *Lastmor Products Manufacturing Corp. v. Storozom,* 279 App. Div. 748, 108 N.Y.S. 2d 317 (2d Dept. 1951), aff'd 304 N.Y. 597, 107 N.E. 2d 87, does not hold that multi-member arbitration panels can render a valid award without the tainted member, but is a "waiver" case. *St. George Textile Corp. v. Brookside Mills Inc.,* N.O.R. 85 N.Y.S. 2d 621 (S. Ct. N. Y. Co. 1948) did permit the untainted arbitrators to render an

award but is a lower-court decision that cannot be considered an authoritative exposition of state law.

III.

Petitioner never waived his right to due process

Apart from the lack of any federal authority to support the assertion that petitioner waived his due process claim, br., p. 10, respondent also misstates some critical facts. Petitioner's counsel could not have made any written objection to the chairman's continued participation since he, himself, did not learn of the negotiations between the chairman and petitioner until after the award had been rendered, pet., p. 24a. Why petitioner did not disclose these negotiations during the pendency of the arbitration—even to this counsel—has been set forth at pp. 11-12 of the petition. Nowhere does respondent dispute petitioner's major premise that petitioner was under duress since it would have been commercially hazardous for him to have "blown the whistle" on the chairman.

The unsupported suggestion by respondent that an arbitrator's bias is an "evidentiary" matter, br., p. 11, and not something going to the very integrity of the decision-making process, is ludicrous. It is because the issue raised herein goes to the fundamental fairness of the arbitration process that cases such as *Johnson v. Zerbst,* 304 U.S. 458 (1938) are pertinent to the case at bar.

IV.

The question presented in the petition was properly preserved and presented for review in this court

Contrary to respondent's assertion, br., p. 5, the question of denial of due process presented herein was raised at the

very outset of the state court proceedings, as reflected in the trial judge's decision (pet., pp. 10-11a). Respondent acknowledges that the issue was discussed in petitioner's brief to the Appellate Division. Pursuant to the rules of the New York Court of Appeals, a copy of that brief was included among the papers submitted on petitioner's motion for leave to appeal, 22 N.Y. Codes, Rules & Regs. §500.11(d). This question was necessarily before the Court of Appeals on the motion for leave to appeal and even respondent concedes that the question was briefed extensively on the motion for rehearing, br., p. 5.

Respondent improperly attempts to tax petitioner with omitting portions of the record, br., p. 4. Although both petitioner and respondent have necessarily made reference to the facts underlying this case, the issue before this Court is not whether the arbitrators correctly determined the merits but whether the state courts enforced an award that, for purposes of these proceedings, must be assumed to have been tainted by the chairman's bias.

The respondent at br., p. 4, seeks to take advantage of a typographical error at pet., p. 6a,* which reads

> ***Mirzoeff has not sufficiently demonstrated his allegations of the *arbitrator's* misconduct. (emphasis added)

As the respondent is aware, that passage from the opinion of the Appellate Division as officially reported at 161 AD 2d 348, 349, reads

> ***Mirzoeff has not sufficiently demonstrated his allegations of the *arbitrators'* misconduct. (emphasis added)

*Page 6a, as corrected, and Page 7a (the opinion of the Appellate Division) are appended hereto.

Accordingly, respondent's contention as to a "key finding of fact" by the Appellate Division is erroneous. The Appellate Division was merely making a general reference to other state law issues in the case. In the following paragraph, the Appellate Division turned to the issue sought to be reviewed herein, holding petitioner to have waived the issue of the chairman's bias by continuing to participate in the arbitration. This is precisely the ground upon which the trial court ruled, pet., p. 11a. As petitioner demonstrated, pet., p. 12, this issue was never "waived."

Respondent's reliance, br., p. 12, upon *Columbe v. Connecticut,* 367 U.S. 568, 603 (1961) as authority for deference to state court findings of fact is ironic. The portion of the opinion cited by respondent speaks of the advantage of the trial court in being able to judge the credibility of the witnesses before it. In the case at bar, despite the stark conflict between petitioner and the chairman as to what occurred between them, pet., pp. 19-23a, the trial court failed to hold an evidentiary hearing into the arbitrator's alleged misconduct; to hear the witnesses so that their credibility might be judged. Such a failure would be remediable upon remand from this Court. Respondent makes no attempt to distinguish this case from those cited at p. 8 of the petition, such as *N. Y. Times v. Sullivan,* 376,.U.S. 254, 285-86 (1964), where this Court has scrutinized the record to determine if governing federal law has been properly applied to questions of constitutional right; and, in this case, whether a hearing was unconstitutionally denied by the state court.

V.

There is no basis for respondent's invocation of Rule 42.2

Whatever the disposition of this case, the arguments set forth in the petition and in this brief demonstrate that petitioner has presented reasonable, good-faith arguments for extension, modification or clarification of existing law. For this reason, there is no foundation for respondent's request for damages or costs under Rule 42.2 of the Rules of this Court, *Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1071, f.n. 11 (1981) (Stevens, J., concurring).

Moreover, any delay in the payment of the judgment sought to be reviewed herein has not harmed respondent. He was protected by the appeal bond that remained in force from the taking of the initial appeal to the Appellate Division, through all appellate proceedings, including an application to the Appellate Division for a stay pursuant to Rule 23.3, when an interim stay was in effect, until Justice Marshall denied petitioner's application for a stay on June 7, 1991, whereupon the judgment was satisfied.

Dated: New York, New York
June 19, 1991

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Opinion of the Appellate Division, May 10, 1990, Affirming Confirmation of Arbitrator's Award

In the Matter of the Arbitration between Moti Namdar, Respondent, and Eli Mirzoeff, Appellant.—Order and Judgment (one paper), Supreme Court, New York County (Karla Moskowitz, J.), entered January 20, 1989, which confirmed an arbitration award rendered on February 12, 1988 by a unanimous five-member appeal committee of the Diamond Dealers Club, Inc. in favor of petitioner for the sum of $64,767.91, is unanimously affirmed, with costs.

The underlying facts of this case concern the sale of a sapphire sold by Moti Namdar and Shmuel Nissim to Eli Mirzoeff. The arbitrators subsequently determined that Mirzoeff owed Namdar the negotiated price of the sapphire. Namdar moved to confirm the award. Mirzoeff opposed the motion alleging that the arbitrators were prejudiced against him, the award was irrational and the arbitration proceeding was marred by procedural irregularities. The IAS court granted the petition to confirm the award and rejected Mirzoeff's contentions.

Courts have fostered a clear judicial policy in favor of non-interference in arbitration proceedings. (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623.) In a consensual arbitration such as this one, arbitrators are not bound either by principles of substantive law or the rules of evidence. (*Matter of Silverman [Benmore Coats]*, 61 NY2d 299, 308.) Rather, the burden of proof is on the party alleging the misconduct and such misconduct must be proven "clear[ly] and convincing[ly]". (*Matter of Weiner Furniture Co. [Kingston City Schools Consol.]*, 90 AD2d 875.) Upon our review of this record, we conclude that Mirzoeff has not sufficiently demonstrated his allegations of the arbitrators' misconduct.

A party who proceeds with an arbitration with actual knowledge of bias on the part of an arbitrator or facts that

should have prompted further inquiry, waives his objection to the arbitration. (*Matter of Stevens & Co. Inc. [Rytex Corp.]*, 34 NY2d 123, 129.) In this case, the alleged prejudice of the arbitrators was known to Mirzoeff before completion of the arbitration proceeding. Mirzoeff, however, did not raise the alleged bias until well after the arbitration award was rendered. Accordingly, the claims relating to the arbitrators' alleged prejudice have been waived. (*See, Matter of Siegel [Lewis]*, 40 NY2d 687, 690.)

We have considered Mirzoeff's other claims and find them to be meritless. Concur—Kupferman, J. P., Sullivan, Ross, Carro and Kassal, JJ.